RECORD AND BRIEFS

No. 16-980

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In The
Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* COMMON CAUSE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Common Cause is a nonpartisan, grassroots, citizens' organization dedicated to fair elections and making government at all levels more democratic, open, and responsive to the interests of all people.[1] Founded by John Gardner in 1970 as a "citizens' lobby," Common Cause has over one million members nationwide and has local chapters in 30 States, including in Ohio. Common Cause has been a leader in the fight for open, honest, and fair elections. Common Cause has also been a leading proponent of redistricting reforms and a vigorous opponent of partisan gerrymanders and voter suppression by both political parties. Common Cause is currently challenging Georgia's voter removal process which is similar to the procedure at issue here.

SUMMARY OF THE ARGUMENT

The outcome of this case will not affect only Petitioner and the state of Ohio. Nor will it just affect the hundreds of thousands of eligible voters in Ohio who

[1] This *amicus* brief is filed in support of respondents with the consent of the parties. Petitioner and respondents have granted blanket consent. Pursuant to Rule 37.6, the *amicus* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part and that no person other than the *amicus* paid for or made a monetary contribution toward its preparation and submission.

have been and will be unlawfully removed from the voter registration rolls by virtue of Petitioner's illegal practices. What the Court decides here will have ramifications across the country, potentially resulting in the removal of millions of eligible Americans from voter registration rolls, preventing them from exercising their constitutionally protected right to vote in upcoming elections – at a time when collective participation is already too low for a democracy of our kind.

Indeed, in a handful of other states, voters are currently being illegally purged from voter registration rolls because of practices comparable to those of Petitioner. In many, if not most, instances, these citizens may not become aware that they are no longer registered – and thus no longer able to cast a ballot in the next election – until they arrive at the polls on Election Day. By the time they arrive and learn of their removal, it is too late to remedy the problem; these individuals must then sit out that election. (This is so because most of the states subject to the requirements of the NVRA do not have Election Day or same day registration on their legislative books.)

Voters in Georgia, like those in Ohio, face that fate. Georgia has a voter removal program that is substantially identical to the one addressed in this case. Georgia has used this program to remove hundreds of thousands of eligible voters from its rolls over the course of just a few federal election cycles. These purges violate the text of the NVRA because they permit elections officials to identify for purging eligible,

registered voters who have not voted for a specified period of time – despite the fact that such temporary inactivity provides no indication that the individuals have since moved from their homes or otherwise become ineligible to vote. Such temporary inactivity only indicates that an eligible registered voter has, for one of any number of reasons, opted against casting a ballot – a right as American as the right to vote itself – or was prevented from doing so, due to any number of obstacles or external factors.

In 2016, this *amicus*, among others, sued the Georgia Secretary of State to prevent him from illegally removing voters from the rolls for such inactivity. In Georgia, a comparable voter removal program targets individuals who failed to vote for a consecutive three-year period. The case is currently pending in the Eleventh Circuit. *Common Cause and Georgia NAACP v. Kemp*, No. 17-11315 (11th Cir. filed March 23, 2017). After the Supreme Court granted certiorari in this case, Georgia's Secretary of State purged an additional 590,000 individuals from the voter registration rolls – many of whom were purged precisely because they had been placed on the "inactive" list due to not having voted during a three-year period. Practices like those of Petitioner and the Georgia Secretary of State violate the NVRA's express terms and fly directly in the face of the NVRA's purpose. As such, they must be prevented in any state.

ARGUMENT

I. REGARDING REMOVAL OF VOTERS, THE NVRA AND HAVA HAVE TWO PURPOSES: TO PERMIT THE REMOVAL OF ONLY INELIGIBLE VOTERS AND TO ENSURE THAT NO VOTER IS REMOVED FOR FAILING TO VOTE.

The National Voter Registration Act (NVRA) and the related Help America Vote Act (HAVA) were both designed to increase voter registration and participation. The NVRA's express legislative purposes include "increas[ing] the number of eligible citizens who register to vote" and "enhanc[ing] the participation of eligible citizens as voters." 52 U.S.C. § 20501(b)(1)-(2). HAVA was also intended to increase voter participation. It was enacted to "alleviate 'a significant problem voters experience, which is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters.'" *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (quoting H.R. Rep. No. 107-329 at 38 (2001) (alterations adopted)).

Notably, HAVA explicitly reaffirmed the NVRA's efforts to prevent improper voter removal. *See* 52 U.S.C. § 21145(a)(4) ("[N]othing in [HAVA] may be construed to authorize or require conduct prohibited under . . . or to supersede, restrict, or limit the application of . . . [the NVRA]."); *see also* H.R. Rep. No. 107-329 at 37 ("[R]emoval of those deemed ineligible must be done in a manner consistent with the [NVRA]. The

procedures established by NVRA that guard against removal of eligible registrants remain in effect under this law. Accordingly, [HAVA] leaves NVRA intact, and does not undermine it in any way.").

For purposes of removing voters from a State's rolls, these statutes have two touchstones. First, they are targeted *exclusively* at removing *ineligible* voters. *See* 52 U.S.C. § 20507(a)(4) (NVRA requirement that States "remove the names of *ineligible* voters") (emphasis added); *id.* § 21083(a)(4)(A) (HAVA requirement that States "remove registrants who are *ineligible* to vote.") (emphasis added). Nothing in these statutes authorizes the removal of *eligible* voters – indeed, doing so would contradict the stated purposes of "increasing the number of eligible citizens who register to vote" and "enhancing [voter] participation."

Second, both federal statutes expressly prohibit States from removing a voter solely because he or she failed to vote. *See id.* § 20507(b)(2) (NVRA requirement that no voter be removed "by reason of the person's failure to vote"); § 21083(a)(4)(A) (HAVA requirement that "no registrant may be removed solely by reason of a failure to vote"). Failure to vote in any election, as indicated by the language of both the NVRA and HAVA, in no way calls into question the voter's eligibility.

II. UNDER THE NVRA, CONFIRMATION NOTICES MAY ONLY BE SENT TO INDIVIDUALS WHO APPEAR TO HAVE MOVED, AS DETERMINED BY RELIABLE EVIDENCE; NON-VOTING CANNOT AMOUNT TO RELIABLE EVIDENCE.

A. The NVRA Contains A Number Of Voter-Removal Requirements That Must Be Met Before A State May Initiate The Purging Process, And The State Of Ohio, Like Every Other State Covered By The NVRA, Must Meet Every Requirement.

The relevant NVRA section, 52 U.S.C. § 20507, contains a number of provisions that limit a State's ability to remove voters from its voter rolls. It states:

> (a) In general
>
> In the administration of voter registration for elections for Federal office, **each State shall** –
>
> . . .
>
> (3) provide that the name of a registrant **may not be removed from the official list of eligible voters except** –
>
> (A) at the request of the registrant;
>
> (B) as provided by State law, by reason of criminal conviction or mental incapacity; or
>
> (C) **as provided under paragraph (4);**

(4) conduct a **general program** that makes **a reasonable effort** to remove the names **of ineligible voters** from the official lists of eligible voters by reason of –

(A) the death of the registrant; or

(B) **a change in the residence of the registrant, in accordance with subsections (b), (c), *and* (d)**;

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office –

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) **shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, *except*** that nothing in this paragraph may be construed to prohibit a State from using the procedures **described in subsections (c) *and* (d)** to remove an individual from the official list of eligible voters if the individual –

(A) has not either notified the applicable registrar (in person or in writing) or responded during the

period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State *may* meet the requirement of subsection (a)(4) by establishing a program under which –

(A) *change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed*; and

(B) if it appears from information provided by the Postal Service that –

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not

in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to *confirm* the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude –

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this chapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant –

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and preaddressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period

> the registrant's name will be removed from the list of eligible voters.
>
> (B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.
>
> (3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

52 U.S.C. § 20507 (emphasis added).

Subsection (a) provides requirements for how the States maintain their voter lists, setting out a limited number of circumstances in which previously qualified registrants, who have since become ineligible due to mental incapacity, felony conviction, death, or change in address, may be removed. To determine whether a registrant has since become disqualified due to death or a change in address, the State must adopt a *general* program that makes a reasonable effort to determine the change, unless, in the case of a change of address, the registrant notifies the elections office him or herself. Subsection (a)(3) prohibits a state from removing a voter's name unless certain conditions are met. The only voter-removal condition that is applicable here is subsection (a)(3)(C), which allows a state to remove a voter's name if the state complies with subsection (a)(4).

Subsection (a)(4), in turn, requires a "general program that makes a *reasonable effort* to remove the names of *ineligible* voters." (emphasis added). This sets the general rule applicable to this case: A State's voter removal program must be a "*reasonable effort*" to remove "*ineligible* voters."

More specifically, to remove a voter because he or she has changed residence, subsection (a)(4)(B) also requires that the State comply with subsections "(b), (c) *and* (d)." *Id.* at § 20507(a)(4)(B) (emphasis added). These three subsections combine to form a set of protections to prevent improper removal of eligible voters. Based on the use of the word "and," any removal of voters must comply with all three subsections. Subsection (b) requires (1) that any state activity must be uniform, nondiscriminatory and comply with the Voting Rights Act; and (2) that any state activity ***"shall not result in the removal . . . by reason of the person's failure to vote, except*** that nothing in this paragraph may be construed to prohibit a state from using the procedures described in subsections (c) ***and*** (d) to remove an individual. . . ." *Id.* at § 20507(b)(2) (emphasis added).

Thus, for purposes of removing *ineligible* voters based on change of address, subsection (b) establishes the general rule that voters may not be removed for failure to vote. But it provides that a State is not prohibited from using the procedures in subsections "(c) *and* (d)." Subsection (c), entitled "Voter removal programs," provides a permissive safe harbor where states

"*may*" comply with subsection (a)(4) by initiating a removal process based on the USPS change of address database.

Subsection (d) is different. Unlike subsection (c), it is not a permissive safe harbor. Nowhere does the NVRA state that compliance with subsection (d)'s notice process alone meets the requirements of subsection (a)(4). Had Congress intended the subsection (d) notice process to be a safe harbor like subsection (c), it would have said so.

Instead, subsection (d)'s notice process is an additional restriction on voter removal, which expressly prohibits a State from removing a voter based on purported change of address without sending the voter a specific written notice and waiting the prescribed period of time. (It says: "A state *shall not*. . . ."). Given what the statute actually says, subsection (d) cannot be a standalone safe harbor, but is instead an *additional restriction* on any voter removal program based on change of address. States must meet this requirement in addition to the others contained in 52 U.S.C. § 20507. This conclusion is buttressed by the statute's description of subsection (d): It says subsection (d)'s notice requirement is used "to ***confirm*** the [voter's] change of address" before final removal. *Id.* at § 20507(c)(1)(B)(ii) (emphasis added). Thus, subsection (d) cannot be the initial basis for concluding that a voter has changed address; it is merely an additional "confirm[ation]" of some *other* indicia of a change of address; it is a means of confirming other independent information that a voter has moved.

The language of subsections (a)(4)(B) and (b)(2) likewise demands this conclusion. Both of those subsections use the word "*and*" in requiring compliance with subsection (d). Subsection (a)(4)(B) requires change of residence programs to be conducted "in accordance with subsections (b), (c) ***and*** (d)." (emphasis added). Subsection (b)(2) says that the prohibition on removing non-voters may not be construed to prohibit a State program that uses "the procedures described in subsections (c) ***and*** (d)." (emphasis added).

Reading the entire statute makes clear that a State may not remove a voter unless it complies with certain requirements. To satisfy these requirements, a voter removal program based on change of residence can ***either*** fall into the subsection (c) safe harbor (in which case it must comply with subsection (c) and the notice requirements of (d)), ***or*** it must comply with all of the other requirements, which include subsection (a)(4)'s requirement that it be a "reasonable effort" to remove "ineligible" voters; subsection (b)'s requirement that it be uniform, non-discriminatory and "***not*** result in the removal" of a voter for failure to vote; and subsection (d)'s notice requirements. If Petitioner's interpretation of the statute were adopted, or his practice deemed permissible, then (b)'s explicit prohibition on removals based on failure to vote would be utterly meaningless in the change-of-address context. But Congress specifically added that language, and it may not be deemed superfluous.

B. HAVA Did Not Amend The NVRA's Prohibition Against Using Non-Voting To Purge Voters.

HAVA directly supports the plain language reading of the NVRA. The full text of 52 U.S.C. § 21083(a)(4)(A) states:

> The State election system **shall** include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
> (A) A system of file maintenance that **makes a reasonable effort to remove registrants who are ineligible** to vote from the official list of eligible voters. Under such system, **consistent with the [NVRA]**, registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office **shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote**.

(emphasis added).

First, HAVA reaffirms that any state program must make a "reasonable effort" to remove "ineligible" voters. Any analysis that ignores this requirement is erroneous.

Second, HAVA does not repeal any of the requirements of the NVRA. Instead, it does the exact opposite: It requires that any voter removal program must be "consistent with the NVRA."

Third, this provision repeats that "no registrant may be removed ***solely*** by reason of a failure to vote."

The statute provides that voters may be removed if they "have not responded to a notice and . . . have not voted in 2 consecutive general elections for Federal office." However, if compliance with these two provisions alone were enough to satisfy the statute, then the language in (a)(4)(A)'s final clause, which prohibits removing voters solely for failing to vote, would be meaningless. That cannot be. That final clause – "except that no registrant may be removed solely by reason of a failure to vote" – is an *exception* to a State's ability to remove "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office." *Id.* at § 21083(a)(4)(A). Satisfying those two conditions is not sufficient; the statute requires more: States must also comply with the exception. If complying with both conditions were enough, then the exception would have no meaning. Thus, HAVA supports the conclusion that the requirements of the NVRA must be met.

III. GEORGIA'S LAW, LIKE OHIO'S, TARGETS INDIVIDUALS WHO FAILED TO VOTE, AND "RESULTS IN THE REMOVAL OF" MASSIVE NUMBERS OF THOSE VOTERS "BY REASON OF THEIR FAILURE TO VOTE," IN DIRECT VIOLATION OF THE NVRA.

After the NVRA was enacted in 1993, Georgia (along with a handful of other states) adopted a new

election code in an effort to conform to the NVRA's requirements. Except for O.C.G.A. § 21-2-234, Georgia's voter-removal programs comply with the NVRA. *See, e.g.*, O.C.G.A. § 21-2-231(a) (removal of voters for felony convictions); *id.* 21-2-231(b) (mental incapacity); *id.* § 21-2-231(d) (death); *id.* § 21-2-232(b) (registration to vote in another state); *id.* § 21-2-233 (change of residence based on information from the USPS change-of-address database, in compliance with the USPS Safe Harbor Procedure in subsection 8(c) of the NVRA).

But one of Georgia's voter-removal programs, codified at O.C.G.A. § 21-2-234, directly violates the NVRA like the Ohio program at issue here. Section 234 requires the Georgia Secretary of State to initiate voter-removal proceedings against voters who have failed to vote (or make other voting-related "contact" with election officials) for three consecutive years, without requiring a showing of more. Section 234 provides in pertinent part:

> In the first six months of each odd-numbered year, the Secretary of State shall identify all electors whose names appear on the list of electors with whom there has been no contact[2]

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[2] Georgia's Election Code defines "no contact" as follows:

> [T]he elector has not filed an updated voter registration card, has not filed a change of name or address, has not signed a petition which is required by law to be verified by the election superintendent of a county or municipality or the Secretary of State, has not signed a voter's certificate, and has not confirmed the elector's continuation at the same address.

§ 21-2-234(a)(1); *see also id.* § 21-2-235(b).

> during the preceding three calendar years and who were not identified as changing addresses under Code Section 21-2-233.

After identifying voters who have made "no contact" – which almost exclusively consists of individuals who have not voted during the specified time period – the Secretary sends address-confirmation notices to those voters. A voter who receives an address-confirmation notice must respond within 30 days.[3] This is true even "if the elector has not changed addresses" – and therefore is still eligible to vote. If the voter fails to respond within 30 days, his or her name is transferred to a list of "inactive" voters. O.C.G.A. § 21-2-234(c)(2). If he or she fails to vote in the next two general elections, the voter will be removed from the voter-registration rolls. *Id.* § 21-2-235.

The Georgia law is no small matter. Indeed, if allowed to continue, laws like this – and the one at issue in Ohio – can wipe out any increase in voter registration, despite the introduction of reforms such as online voter registration that aim to remove longstanding barriers to registration and voting. Moreover, practices

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While this definition of "no contact" does not expressly include failure to vote, "sign[ing] a voter's certificate" is the equivalent of voting in Georgia. *See* O.C.G.A. § 21-2-431(a) ("At every primary and election, each elector who desires to vote shall first execute a voter's certificate. . . .").

[3] The U.S. Election Assistance Commission reports that the national average return rate of address-confirmation notices is only 20%. EAC Report, available at https://www.eac.gov/assets/1/1/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf, at 23.

like those used in Georgia, Ohio, and elsewhere disenfranchise otherwise eligible voters from exercising their constitutional right to vote; by the time many of these citizens learn of their removals from the voter registration rolls it is simply too late for them to re-register and vote, particularly because of many states' registration deadlines. Targeting voters for simply having failed to vote violates the NVRA's text and its purposes of expanding the electorate, ensuring greater participation in our country's elections.

CONCLUSION

The relevant provisions of the NVRA are straightforward. Pursuant to subsection (a)(4), States must make a reasonable effort to remove ineligible voters only. Pursuant to subsection (b), they cannot remove voters based on failure to vote. And before a State removes any voter, it must provide the notice required by subsection (d). These requirements can be met by showing a reasonable effort, targeted at ineligible voters, that does not result in their removal for not voting. Or, if a state wants a safe harbor, it may simply comply with subsection (c), and engage in a general program that relies on reasonable data such as that provided by USPS for identifying probable changes of address, while still providing the notice required by subsection (d). That would suffice as a matter of law for purposes of keeping the registration rolls up to date with respect

to potential changes of address. But a State's identification and targeting of non-voters for the purging process violates both the text and purposes of the NVRA and HAVA.

Respectfully submitted,

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